



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

August 5, 2003

Mr. R. Kevin Rhyne
Henslee, Fowler, Hepworth & Schwartz
110 North College Avenue, Suite 1116
Tyler, Texas 75702

OR2003-5443

Dear Mr. Rhyne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185483.

The Winona Independent School District (the "district"), which you represent, received a request for (1) information relating to two former employees of the district, including their employment files, documents regarding complaints or concerns regarding the former employees, documents reviewed or compiled before the former employees were hired or in preparation for any review of their employment, retention, or job performance, civil or criminal petitions filed against the district or any of its agents that involve or relate to the former employees, civil or criminal petitions filed against or involving allegations concerning the former employees, and documents containing complaints regarding sexual harassment or molestation by the former employees; (2) liability insurance policies that insured the former employees or the district in the last five years; (3) civil or criminal pleadings filed against the district or any its agents in the last five years; and (4) complaints regarding sexual harassment or molestation by any agent of the district in the last five years.¹ The district claims that the requested information is excepted from disclosure under sections 552.101,

¹We note that the requestor also asks for "an index or similar statement of the scope of any materials withheld by [the district], with a citation to the exemption sections upon which the withholding or deletion is based." Chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

552.103, 552.114, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.²

We first find that the information submitted as Exhibit D is not responsive to any aspect of the present request for information. Therefore, this ruling does not address any of the information submitted as Exhibit D, and the district need not release any of that information.

We next note that some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). In this instance, the submitted information includes completed evaluations, completed reports, and a completed investigation made of, for, or by a governmental body. The district must release the completed evaluations, reports, and investigation under section 552.022(a)(1) unless they contain information that is excepted from disclosure under section 552.108 or expressly confidential under other law. The submitted documents also include information contained in contracts that relate to the receipt or expenditure of public or other funds by the district, as well as information that also is contained in a public court record. The district must release the information contained in the contracts under section 552.022(a)(3) unless any of that information is expressly confidential

²This letter ruling assumes that any submitted samples of requested information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

under other law. The district also must release the information that also is a matter of public court record under section 552.022(a)(17) unless any of that information is expressly confidential under other law. The district claims that the information that is subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is subject to section 552.022(a)(1), (3), or (17) under section 552.103.

With regard to some of the information that is subject to section 552.022, the district also raises section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. Chapter 261.201 of the Family Code is applicable to information that relates to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 of the Family Code provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also* Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor). In this instance, the completed investigation that is subject to section 552.022(a)(1) was conducted by the Texas Department of Protective and Regulatory Services ("DPRS") under chapter 261 of the Family Code. *See* Fam. Code § 261.406(a). We assume that the information that relates to the investigation was provided to the district by DPRS. *See id.* § 261.406(b). We find that the information that relates to the DPRS investigation is confidential in its entirety under section 261.201 of the Family Code. The district must

withhold that information, which we have marked, under section 552.101 of the Government Code as information made confidential by law.

You also contend that other submitted section 552.022(a)(1) information is confidential under section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word “teacher,” for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4. We also concluded that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

We agree that the section 552.022 information includes evaluations that may be confidential under section 21.355. We have marked that information. You do not inform us, however, whether any of the submitted evaluations relate to an individual who held a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055, and was engaged in the process of teaching, at the time of the evaluation, or who held an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and was performing the functions of an administrator, at the time of the evaluation. *See* Educ. Code § 21.355; Open Records Decision No. 643 at 4. Thus, we are unable to conclude that any of the submitted evaluations are confidential under section 21.355. To the extent, however, that they relate to an individual who qualified as a teacher or administrator under section 21.355 of the Education Code at the time of the evaluation, the submitted evaluations are excepted from disclosure under section 552.101 of the Government Code. An evaluation of an individual who did not qualify as a teacher or administrator under section 21.355 at the time of the evaluation is not confidential under that section and therefore may not be withheld under section 552.101.

The submitted documents also include information that is subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is subject to the MPA. The district must not release that information unless the MPA permits the district to do so.

The district also claims that some of the section 552.022 information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who timely requests under section 552.024 that such information be kept confidential. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the district received the present request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election to keep the information confidential. You inform us that the submitted information relates to former employees who made timely requests for confidentiality under section 552.024. We note, however, that the section 552.024 election of one of the former employees encompasses only his home address and telephone number. Therefore, the district must

withhold that former employee's home address and telephone number under section 552.117(a)(1). The other former employee's section 552.024 election encompasses his home address and telephone number, social security number, and any information that reveals whether he has family members. Therefore, the district must withhold the other former employee's home address and telephone number, social security number, and any family member information under section 552.117(a)(1). We have marked the types of information relating to the two former employees that the district must withhold under section 552.117(a)(1). The documents that are subject to section 552.022 also contain other information that the district may be required to withhold under section 552.117(a)(1) if the information relates to a current or former official or employee of the district who timely elected under section 552.024 to keep the information confidential. We have marked the types of information that may also be excepted from disclosure under section 552.117(a)(1).

We note that a social security number may also be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the district obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number in question here is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number in question here was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

With regard to the submitted information that is not subject to section 552.022, we address the district's claim under section 552.103 of the Government Code. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that the district has received a demand letter in which two attorneys threaten a lawsuit against the district based on allegations of misconduct involving a child. You have submitted a copy of that letter. Based on the letter, you assert that the district reasonably anticipated litigation on the date of its receipt of this request for information. You also contend that the requested information relates to the anticipated litigation. Based on your arguments and the submitted demand letter, we find that you have shown that the district reasonably anticipated litigation on the date of its receipt of the present request for information. We also find that the rest of the submitted information relates to the anticipated litigation. We therefore conclude that the district has demonstrated that section 552.103 of the Government Code is applicable to the submitted information that is not subject to section 552.022.

In reaching this conclusion, we assume that the district does not seek to withhold any information that the opposing party to the anticipated litigation has seen or to which the opposing party already has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records

Decision No. 551 at 4-5 (1990). Thus, if the opposing party to the anticipated litigation already has seen or had access to any of the remaining information at issue, through discovery or otherwise, then there is no interest in now withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the remaining information includes notices and minutes of meetings of the district's board of trustees, which we have marked. The district may not withhold that information under section 552.103. *See* Gov't Code § 551.022 (minutes of open meeting are public records and shall be available for public inspection and copying on request); Open Records Decision No. 221 (1979) (statutory predecessor to Gov't Code § 552.103 not applicable to official records of governmental body's public proceedings). Otherwise, the submitted information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103. The applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The district must not release confidential information, however, even at the conclusion of related litigation. *See* Gov't Code §§ 552.007, .352.

Lastly, we note that the records relating to meetings of the board of trustees contain information that is subject to the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

The records that relate to board meetings contain information that is confidential under FERPA. The district must not release that information unless it has authority under FERPA to do so.

In summary, the district must withhold the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. To the extent that the submitted evaluations are confidential under section 21.355 of the Education Code, the evaluations also are excepted from disclosure under section 552.101. The district must not release the information that is subject to the MPA unless the MPA permits the district to do so. The district must withhold any information that is excepted from disclosure under section 552.117(a)(1). A social security number may also be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The submitted information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103. The district must not release information that is confidential under FERPA unless the district has authority under FERPA to do so. The district must release the rest of the submitted information. As these determinations are dispositive, we do not address the district's claims under sections 552.114 and 552.135.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

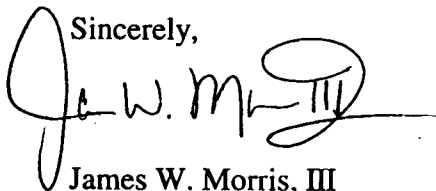
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 185483

Enc: Submitted documents

c: Ms. Jennifer Rustay
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(w/o enclosures)